JAMES PETERS

IBLA 86-923 Decided)ctober 27, 1988

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting hardrock preference right lease application ES 2708l.

Affirmed.

1. Mineral Lands: Leases--Mineral Lands: Prospecting Permits

An application for a preference right lease made in 1986 was required to include the information specified under 43 CFR 3521.1-1 (1985). An application which was not in conformance with the requirements of 43 CFR 3521.1-1 (1985) was properly rejected.

APPEARANCES: James Peters, pro se; Mary Katherine Ishee, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James Peters has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated February 24, 1986, rejecting preference right lease application ES 2708l both for failure to provide the information required under 43 CFR 3521.l-l (1985) (now 43 CFR 3563.1-1), as well as failure to show the existence of a valuable discovery as required by 43 CFR 3520.1-1 (1985) (now 43 CFR 3563.2-1).

On February 10, 1981, appellant filed an application for a prospecting permit for lands described as SW^ NW^, NW^ SW^, SE^ SW^, SW^ SW^, sec. 8, T. 25 N., R. 2 E., Michigan Meridian, Oscoda County, Michigan, situated in the Huron National Forest. These lands were acquired under the provision of the Weeks Act, Act of March 1, 1911, 36 Stat. 963, for the purpose of water-shed protection.

Hardrock leasing of lands acquired under the Weeks Act was authorized by the Act of March 4, 1917, 39 Stat. 1150, under such terms and conditions as the Secretary of Agriculture deemed appropriate. Pursuant to section 402 of Reorganization Plan No. 3, 60 Stat. 1099, this authority was transferred to the Secretary of the Interior, with the proviso that mineral development of such lands could be authorized only upon a finding by the Secretary of Agriculture "that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified." Accordingly, upon receipt of the application for a prospecting permit, the Eastern States Office transmitted the application to the United States Forest Service for its review and consent.

On October 7, 1983, the Regional Forester informed BLM of the Forest Service's consent to issuance of the prospecting permit, subject to various special stipulations designed to protect nonmineral resource values. Thereafter, following submission of a bond to assure reclamation of the land disturbed, the prospecting permit issued effective April 1, 1984, for a period of 2 years. As issued, the minerals covered by the prospecting permit were gold, platinum, palladium, rhodium, and osmium.

The record makes it clear that, following issuance of the prospecting permit, appellant made substantial expenditures of time and effort in pursuing a discovery of the minerals covered by his prospecting permit. On June 7, 1984, appellant informed the Eastern States Office of his desire to apply for a preference right lease. Appellant subsequently inquired as to the possibility of extending his prospecting permit, as well.

By decision dated February 24, 1986, the Eastern States Office rejected the application for a preference right lease. Based on analyses prepared by the Milwaukee District Office, BLM, the State Office held that the application failed to contain any of the information required by the regulations and, furthermore, that the information which appellant had submitted did not establish that he had made a discovery of a valuable mineral deposit within the boundaries of his permit as required by 43 CFR 3520.1-1(a) (now 43 CFR 3563.2-1). However, this decision also noted that appellant was eligible for a 4-year extension of his prospecting permit and advised him that certain moneys which he had submitted with his preference right lease application would be applied towards his permit extension. On March 7, 1986, Peters filed a notice of appeal from that part of the decision rejecting his preference right lease application.

In his statement of reasons in support of his appeal, Peters argued that he had expected that BLM would send him the proper forms after he had submitted the filing fees and advanced rentals for his preference right lease. Receiving none, appellant averred that he assumed that none was needed. With respect to the question whether the evidence which he had submitted established that he had made a discovery within the limits of the permit, appellant made various arguments, the thrust of which was obviously intended to support his assertion that he had earned a preference right to a hardrock lease.

In response to appellant's submissions, BLM referenced an analysis prepared by one Jeffrey L. Nolder in which it was concluded that, based on appellant's own submissions, it was clear that a discovery had not been shown. Appellant had processed approximately 9-cubic yards of material to recover 5 pounds of black sand concentrate. These 5 pounds of black sand concentrate assayed at 1.87 troy ounces of gold per ton of concentrate. In effect, therefore, assuming that each cubic yard of unprocessed rock weighed approximately 1.3 tons, the rate of return was approximately 14 cents per ton or a total of $1.64 for the entire 9 yards, at a price for gold of $342/oz. Even if operations on the claim could be conducted for as little as $1 per ton of raw material processed, it is clear that any opera-tions based on the values so far disclosed could not be economically justified.

With respect to appellant's additional contentions on appeal, BLM noted that appellant had made a miscalculation to a factor of 10 at one point and was making unwarranted assumptions of undiscovered values at another. BLM argued that the record more than supported the conclusion that appellant had failed to establish that a discovery had been made.

[1] Insofar as the rejection of the application for failure to submit the required information is concerned, the record clearly establishes that virtually none of the information required by the regulation was submitted. Thus, 43 CFR 3521.1-1 (1985) was very specific as to the information that must be included with a preference right lease application, among which were a statement of the applicant's other holdings; a complete and accurate description of the land; detailed maps; and the anticipated scope, method, and schedule of development operations. None of this information was provided with the application.

Appellant argued that he anticipated that BLM would send him the required forms after he made his application. The regulation, however, expressly provided that "no specific form is required." 43 CFR 3521.1-1(a) (1985). In any event, appellant, as the party making the application, is the individual charged with assuring that the informational requirements of the regulations are fulfilled. If he was uncertain as to the documentation necessary for filing a preference right lease application he should have inquired of BLM prior to making his application. Clearly, BLM could not issue a preference right lease in response to an application so completely deficient as the one submitted in this case. On this basis, alone, we must affirm the decision of BLM.

With respect to the question whether a discovery had been shown to exist within the limits of the prospecting permit, we find ourselves in agreement with the analysis of BLM. Based on the present record, it would be impossible to find that appellant had made a discovery of a valuable mineral deposit.

We note, however, that BLM has agreed to an extension of the instant prospecting permit in order to permit appellant to conduct further exploration with an aim towards disclosing a valuable mineral deposit. In this regard, we believe it important to reference a regulatory change which may impact on future adjudications of this case.

At the time the decision in the instant case issued, the applicable regulation, 43 CFR 3521.1-1(g)(2) (1985), provided that "[o]n alleging in an application facts sufficient to show entitlement to a lease, a permittee shall have a right to a hearing before an Administrative Law Judge in the Office of Hearings and Appeals." As we noted above, the showings upon which appellant based his entitlement to a preference right lease were clearly insufficient to show his entitlement to a lease.

In 1986, however, this regulation was recodified as 43 CFR 3563.4(b) and, for reasons which are unclear, was substantially altered. The regulation, 43 CFR 3563.4(b), now provides that "on alleging in an application facts the applicant believes to be sufficient to show entitlement to a

lease, a permittee shall have a right to a hearing before an Administrative Law Judge in the Office of Hearings and Appeals." (Emphasis supplied.)

The effect of this change is considerable. Thus, even if the evidence submitted with an application clearly fails to establish entitlement to a preference right lease, the Department is nevertheless required to afford the applicant an opportunity for a hearing so long as the applicant believes these facts entitle him to the lease. 1/ Why an applicant would even bother submitting an application if he did not believe himself entitled to a lease is left unexplained. The practical effect of this regulation is to require a hearing in every single case, even where the undisputed facts establish the lack of entitlement to a lease. The utility of such a procedure, both for the Government and the applicant, is questionable at best. We advert to it now because of its possible impact on future adjudications relating to appellant's prospecting permit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

1/ Prior Board precedent such as Marine Minerals Corp., 76 IBLA 68 (1983), and John S. Wold, 48 IBLA 106 (1980), clearly required the allegation of facts, which if proven, would establish entitlement to a preference right lease. Under the present regulatory scheme, an applicant is entitled to a hearing even if the facts alleged are insufficient to show entitlement so long as the applicant subjectively believes that these facts show that he has earned a preference right lease.